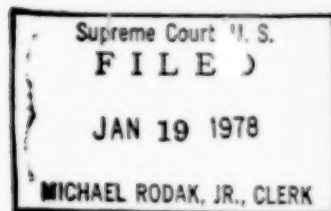


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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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No. 77-448

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NATIONAL AIRLINES, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent.

---

SUPPLEMENTAL BRIEF OF  
PETITIONER NATIONAL AIRLINES, INC.

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January 19, 1978

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NATIONAL AIRLINES, INC., Petitioner,  
v.  
CIVIL AERONAUTICS BOARD, Respondent.

SUPPLEMENTAL BRIEF OF  
PETITIONER NATIONAL AIRLINES, INC.

Petitioner, National Airlines, Inc., ("National") submits this supplemental brief in order to call this Court's attention to recent developments at the Civil Aeronautics Board ("Board") and in the United States Court of Appeals for the District of Columbia Circuit which it believes require that this Court defer consideration of its petition pending further developments in the Court of Appeals.

BACKGROUND

In its petition, National sought review of the Court of Appeals' disposition of the Board's Miami-Los Angeles route award to correct an unwarranted judicial interference with the administrative process in which the Board's procedurally defective order was sustained in part and the agency's discretion on remand was improperly limited in an effort to force an expeditious end to the agency process. Specifically, National urged that the Court of Appeals impermissibly infringed the prerogatives of the Board by refusing to set aside the award in its entirety, by attempting to preclude reexamination of the need for competition issue and by narrowing the Board's discretion on remand to a reconsideration

of the choice between two competing applicants. Briefs in opposition to National's petition were filed by the Board, Western Air Lines, Inc. ("Western") and Pan American World Airways, Inc. ("Pan American"), each of which suggested that the Court of Appeals' mandate was clear, that neither the Board nor any other party wished to reopen the need for competition issue and that the remand proceedings would be handled expeditiously in conformity with the mandate.

EVENTS SUBSEQUENT TO THE BRIEFING OF THIS MATTER

Events subsequent to the filing of the briefs with this Court clearly demonstrate, contrary to the earlier representations of respondents, that the Board and the parties are not in agreement as to the meaning of the Court of Appeals mandate, that the Board and Pan American now believe the need for competition issue should be reopened (although Western believes such reexamination is precluded by the mandate) and that the remanded proceedings will not even begin until the Court of Appeals reexamines its mandate in this case.

These events were set in motion by the Board's issuance on January 11, 1978, of an order setting the scope of the remanded proceedings.\* In this order the Board purported to satisfy the Court of Appeals mandate by agreeing to reconsider its selection of Western over Pan American. At the same time, it indicated that the authority to be awarded in this selection would be temporary in nature and subject to reconsideration in a new, broader proceeding, the Miami-Los Angeles Low-Fare Case (CAB Dkt. 31976).

\* A copy of the Board's Order, Order 78-1-35 (Jan. 11, 1978), is attached as Appendix A.

Initiation of the new proceeding was premised on the Board's dissatisfaction with "current and historic load factors" in the market, Order 78-1-35 at 4. In fact, the Board belatedly concluded that projections of satisfactory load factors on the basis of the tainted, pre-existing record were erroneous and that it was necessary to reexamine competitive conditions in this market, notwithstanding the Court of Appeals' efforts to preserve the Board's earlier resolution of this issue.

The Board's order has now been challenged in the Court of Appeals by Western\* and Pan American\*\*, each of which advances an interpretation of the Court of Appeals' mandate different from the other. Western objects to the Board's interim approach and reopening of the need for competition issue, arguing that the Court of Appeals has limited the Board's discretion to a final choice between Western and Pan American. Pan American argues (contrary to its earlier assertion in this Court that the need for competition issue was closed and that the Board was required on remand to "decide anew between Pan American and Western"\*\*\*) that the mandate should be clarified to confirm that the Board may reopen the competitive need issue and may award authority to both Pan American and Western.

In sum, the Board's latest order and the motions of Western and Pan American underscore the deficiencies in the Court of Appeals' decision and the futility of attempting

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\* Supplemental Memorandum of Western Air Lines in Support of a Motion for an Order Directing Compliance with the Court's Mandate, (Jan. 13, 1978).

\*\* Motion of Pan American World Airways, Inc. to Clarify Mandate (Jan. 16, 1978).

\*\*\* Brief for Respondent Pan American World Airways, Inc., in Opposition at 4.

to conclude the Miami-Los Angeles proceeding on the existing, outdated record. However, the Court of Appeals is now in a position to reconsider its earlier mandate in a manner which may moot, or at least reframe, the issues presented by National. National thus submits that this Court should hold National's petition in abeyance pending a further ruling by the Court of Appeals.

#### CONCLUSION

For the foregoing reasons, Petitioner, National Airlines, Inc., asks that this Court defer consideration of National's petition for certiorari pending the Court of Appeals' resolution of the motions of Western and Pan American.

Respectfully submitted,

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January 19, 1978

UNITED STATES OF AMERICA  
CIVIL AERONAUTICS BOARD  
WASHINGTON, D. C.



Adopted by the Civil Aeronautics Board  
at its office in Washington, D. C.  
on 11th day of January, 1978

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MIAMI-LOS ANGELES COMPETITIVE :  
NONSTOP CASE :  
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Docket 24694

SERVED JAN 12 1978

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MIAMI-LOS ANGELES :  
LOW-FARE CASE :  
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Docket 31976

O R D E R

Introduction

On September 16, 1977, the Board, by Order 77-9-62, solicited comments from parties to this case on the further steps to be taken in light of the remand of the Board's original decision by the United States Court of Appeals for the District of Columbia Circuit. Delta Air Lines, et al. v. CAB, 561 F.2d 293 (D.C. Cir. 1977). Comments were filed on October 6 and reply comments were submitted by October 18. <sup>1/</sup> By and large, the parties present three alternatives. First, Pan American and Western urge the Board to limit the remand to the narrow issue specifically returned by the court, *i.e.*, the choice between Pan American and Western. Delta Air Lines, although originally a losing applicant, now argues that such a limited remand is required by the court's order. Second, Eastern Air Lines, Trans World Airlines, and American Airlines urge the Board to reopen the entire question of carrier selection and permit updating of the record by all interested carriers. Finally, National Airlines, which is the incumbent certificated carrier (Western, the Board's original selection, continues to operate temporarily pending the outcome of the remand), urges the Board to undertake a fullscale reexamination of

<sup>1/</sup> TWA's comments were filed on October 11, accompanied by a motion for leave to file late. We shall grant the motion.

APPENDIX A



the need for competition in the market or, at a minimum, to wait until National's petition for certiorari is disposed of by the Supreme Court. <sup>2/</sup> National requests oral argument on the scope of the remand.

#### General Conclusions

We find that Docket 24694 should be reopened for the limited purpose of allowing Pan American an opportunity for adversarial exploration of the developments which have occurred since the close of the record, in accordance with the court's direction. We shall examine these matters through the use of expedited, non-trial procedures, and without a further initial decision. This will allow the Board to move promptly to final decision. At the same time, we shall initiate a new Miami-Los Angeles case to examine whether or not we can secure the introduction of low-fare Miami-Los Angeles service and thus support the movement within the industry from its historic, near-exclusive reliance on service competition to a greater measure of price competition. We shall consider these matters in a new docket. We discuss these two proceedings separately below.

#### The Current Case

We think it proper to bring the current case to a prompt conclusion. The Board's original decision makes clear that, from the perspective of the traveling and shipping public, no carrier can provide appreciably better service than Western or Pan American. All applicants had proposed two or three daily round trips and none has suggested in the comments that a greater quantum of service is likely to be provided in the primary market. Similarly, no carrier has challenged the Board's earlier finding that Pan American could convenience more beyond traffic than other applicants, notwithstanding its recent reductions in service. Several parties argue that Western's earlier advantage in terms of beyond service has been eroded. This contention is not entirely convincing since Western's impressive route structure beyond Los Angeles remains. We are nonetheless prepared to accept, for present

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<sup>2/</sup> National filed its petition on September 21, 1977, arguing that the Court of Appeals exceeded its authority when it limited the remand to the question of carrier selection between Western and Pan American.

purposes, the argument that Western's beyond-segment capabilities no longer give it a substantial edge over other carriers. Two key underpinnings of the Board's original award, however, continue to distinguish Western from the remaining candidates on the current record -- Western's selection is consistent with the Board's historic policy favoring the strengthening of smaller carriers, and Western's dominant position at Los Angeles serves as a counterweight to National's strength at Miami. In such circumstances, and consistently with the mandate of the Court of Appeals, we believe the public interest requires that we update the record but promptly bring this case to a close and select either Western or Pan American to operate pending a more complete examination of lowfare options and other applications. This course of action complies with our obligation to accord Pan American the procedural opportunity which the Court of Appeals concluded we had improperly denied it.

We are pleased to see the general willingness of interested parties to utilize expedited nontrial procedures similar to those recently employed successfully in the Service to Saipan Case, Docket 24421, and the Service to Richmond Case, Docket 24412, and we have decided to use such procedures to decide the limited issue remaining in this case. We shall require, first, that Western file, within 10 days of the service date of this order, the information relating to its actual experience in the market, as requested in the appendix to Pan American's comments of October 6. Upon review of Western's objections, we find ourselves in agreement with Pan American that the court's directive did not circumscribe the Board's power to require the submission of useful evidence. Upon submission of the evidence, Western will have a full opportunity to argue about its relevance to the Board's inquiry. We shall also authorize the simultaneous filing of comments by Western, Pan American, and any other parties on the narrow issue to be considered, along with information, exhibits, and data that they believe necessary or desirable for an informed examination of events subsequent to the close of the original record. Such comments and data shall be due 28 days from the service date of this order. We will also permit the filing of rebuttal comments, information, data, and exhibits. All rebuttal material shall be filed within 28 days of the due date for the filing of the initial material. Finally, briefs to the Board, which shall conform to the requirements of Rule 31, shall be due 14 days after the due date for the filing of rebuttal material. This schedule is designed to bring the case before the Board in about 75 days and we shall endeavor to conclude it no more than 75 days later.

### The New Case

The Board is keenly interested in promoting market conditions that provide the increased likelihood of low-fare service. The current and historic load factors in the Miami-Los Angeles market suggests it both needs fare competition and offers a particularly attractive opportunity for getting it promptly. As the data in National's comments show, the carrier is operating a wasteful level of capacity for the traffic it is carrying. During the 18 months ended in July 1977, National's load factor never exceeded 47 percent and was generally lower. Western's have been even lower. Moreover, this situation cannot be attributed to the recent entry of Western. National's oral argument materials demonstrate that the condition is chronic, with load factors occasionally dropping below 35 percent. See charts 1 and 2.

In our judgment there is at least one explanation of National's willingness to operate at chronically low load factors: the fare is so high that its breakeven point is even lower. If fares are reduced, the breakeven point will rise, and National will have to increase its actual load factors, either by reducing frequencies or attracting additional traffic. In our view, a substantial fare reduction is likely to attract sufficient traffic to produce reasonable load factors without any reduction in service perhaps enough to permit an increase in service. Such a prospect in this large and important transcontinental market, so long the recipient of sub-par service is, in our view, worth the commitment of time and resources necessary to explore this issue despite the time and effort already expended.

We shall therefore institute a Miami-Los Angeles Low-Fare Case, Docket 31976, for the purpose of considering whether the public convenience and necessity require additional carriers between Miami and Los Angeles.

We actively solicit reduced fare proposals from new entrants, National, and whichever carrier is selected in Docket 24694 to compete temporarily with National.<sup>3/</sup> We have determined, as a matter of general policy, that in this and future cases the offer or failure to offer lower prices will be taken into account in determining whether the public convenience and necessity require the award of new or additional authority and, if so, which carrier or carriers should be selected. For these purposes, the Board expects the record to be developed to examine the need for and feasibility of various new price/quality options.

<sup>3/</sup> We are aware that Western has filed a tariff introducing Super Saver fares, effective January 23, 1978. This development does not dissuade us from the need for a more general route investigation.

The price options which should be explored include, but are not limited to, reduced normal fares, promotional fares, and off-peak pricing.<sup>4/</sup> The quality options which should be considered in order to justify lower prices economically should include, but not be limited to, reduced on-board amenities, higher seating densities, increased load factors, and improved aircraft utilization. Further, we shall consider how lower prices and price competition can be maintained once a case is concluded, whether by making awards temporary or contingent upon the price performance of the carrier receiving new authority, or by other means. We believe that the grant of temporary authority in Docket 24694, coupled with an examination of the issue of renewal, will serve as a useful spur to the establishment of lower fares by the incumbent carriers.

As we have done before, we shall determine whether any new authority should be permissive; whether, particularly if permissive authority is decided upon, multiple awards should be made; and whether multiple awards, under the present statute, are consistent with encouraging real price competition. See Orders 77-12-50, December 9, 1977, and 77-12-115, December 22, 1977. Nothing in the foregoing discussion should be regarded as indicating that traditional service benefits, or the Board's traditional preference for the renewal of temporary authority, should be disregarded. On the contrary, these are important considerations to be weighed with the price and price/quality considerations discussed above. The bases for new route awards, however, will now include the consideration of realistic, cost-based price proposals.

### ACCORDINGLY, IT IS ORDERED THAT:

1. Docket 24694 is reopened for the limited purposes outlined above;

<sup>4/</sup> Off-peak pricing options should include traditional night coach fares, as well as differential pricing at other slack periods, such as weekends and at certain hours of the day, in order to permit higher load factors and more efficient aircraft utilization.

2. Western shall file within 10 days of the service date of this order the information requested in the appendix to Pan American's comments of October 6, 1977.

3. Initial comments concerning changes in circumstances occurring after the close of the original record which may affect the Board's selection of Western or Pan American in Docket 24694 may be filed within 28 days of the service date of this order;

4. Rebuttal information and comments may be filed within 28 days of the due date for the filing of the initial material;

5. Briefs to the Board may be filed within 14 days after the due date for the filing of rebuttal material;

6. The motion of Trans World Airlines in Docket 24694 for leave to file late is granted;

7. A proceeding to be known as the Miami-Los Angeles Low-Fare Case, Docket 31976, shall be instituted and set for hearing before an administrative law judge of the Board at a time and place to be designated later, as the orderly administration of the Board's docket permits;

8. The proceeding instituted in paragraph 7, above, shall consider whether the public convenience and necessity require (i) the modification, alteration or amendment of the certificate of the successful applicant in Docket 24694 so as to renew the authority to operate nonstop service between Miami-Ft. Lauderdale, Florida, and Los Angeles-Ontario-Long Beach, California, and (ii) the authorization of a different, or an additional, carrier or carriers to engage in nonstop air transportation between Miami-Fort Lauderdale, Florida, and Los Angeles-Ontario-Long Beach, California.

9. If the answer to the issues in paragraph 8, above, are in the affirmative, the proceeding shall consider which air carrier or carriers should be authorized, and whether the new or existing authority should be subject to any terms, conditions, or limitations;

10. Any authority awarded in Docket 31976 shall be granted without eligibility for subsidy;

11. Applications and motions to consolidate in connection with Docket 31976 shall be filed within 28 days of the service date of this order and answers thereto shall be filed within 25 days thereafter;

12. Petitions for reconsideration of this order, insofar as it institutes the Miami-Los Angeles Low-Fare Case, may be filed by all interested persons within 21 days of the service date of this order.

13. This order shall be subject to any approval deemed necessary by the United States Court of Appeals for the District of Columbia Circuit.

This order shall be published in the Federal Register.

By the Civil Aeronautics Board:

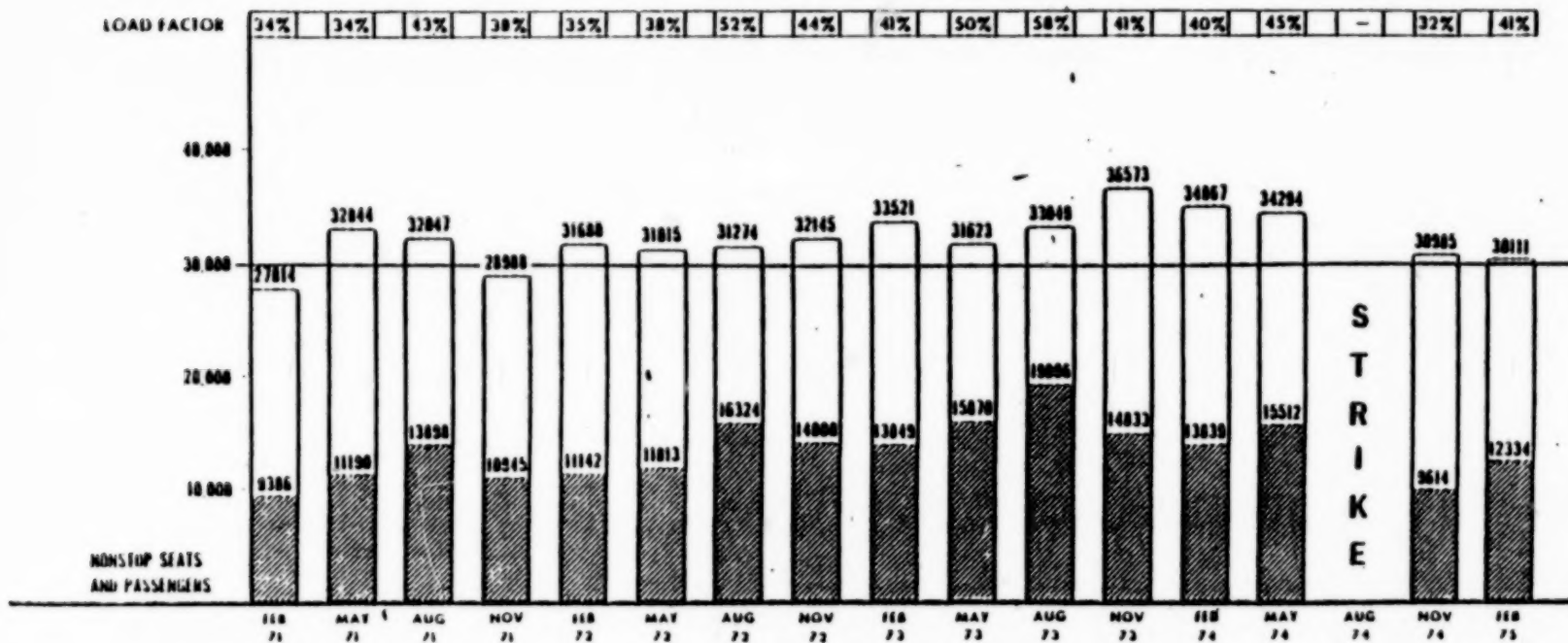
PHYLLIS T. KAYLOR  
Secretary

(SEAL)

All Members concurred.



## NATIONAL'S FOUR-YEAR NONSTOP LOAD FACTORS



SOURCE: NAL 304 303 (UPDATED)

CHART 1



MIAMI-LOS ANGELES

ER-586 NONSTOP TRAFFIC

	<u>Departures</u>		<u>Nonstop Seats</u>		<u>O&amp;D Passengers</u>		<u>O&amp;D L/F</u>		<u>O&amp;D Mkt. Share</u>		<u>On-Board Passrs.</u>		<u>On-Board L/F</u>	
	<u>NA</u>	<u>WA</u>	<u>NA</u>	<u>WA</u>	<u>NA</u>	<u>WA</u>	<u>NA</u>	<u>WA</u>	<u>NA</u>	<u>WA</u>	<u>NA</u>	<u>WA</u>	<u>NA</u>	<u>WA</u>
<u>1976</u>														
January	116		30,086		11,687		38.8		100.0		11,687		38.8	
February	127		33,247		12,829		38.6				12,829		38.8	
March	132		34,464		13,631		39.6				13,764		39.0	
April	130	1/	34,008	1/	14,444	1/	42.5	1/		1/	14,444	1/	42.5	1/
May	164		42,880		16,858		39.3				17,022		39.7	
June	181		47,747		19,565		41.0				20,083		42.1	
July	186		48,296		21,947		45.4				22,433		46.4	
August	188	121	48,450	30,734	20,361	4,781	42.1	15.6	81.0	19.0	20,899	5,232	43.1	17.0
September	177	119	46,037	30,226	14,038	4,876	30.5	16.1	74.2	25.8	14,485	5,363	31.5	17.7
October	188	122	46,371	30,988	15,299	5,601	33.0	18.1	73.2	26.8	15,760	6,138	34.0	19.8
November	135	120	37,556	30,480	13,868	6,439	36.9	21.1	68.3	31.7	13,905	6,718	37.0	22.0
December	130	124	36,176	31,012	15,971	7,872	44.1	25.4	67.0	33.0	15,984	8,349	44.2	26.3
<u>Aug. Thru Dec., 1976</u>	<u>818</u>	<u>606</u>	<u>214,590</u>	<u>153,440</u>	<u>79,557</u>	<u>29,569</u>	<u>37.1</u>	<u>19.3</u>	<u>72.9</u>	<u>27.1</u>	<u>81,033</u>	<u>31,800</u>	<u>37.8</u>	<u>20.7</u>
<u>1977</u>														
January	124	118	34,730	29,749	14,726	7,758	42.4	28.1	65.8	34.5	15,440	8,588	44.5	28.9
February	111	109	31,156	27,694	11,012	6,203	35.3	22.4	64.0	36.0	11,738	6,726	37.7	24.3
March	124	122	34,634	30,988	12,534	7,718	36.2	24.9	61.9	38.1	13,514	8,674	39.0	28.0
April	121	121	34,222	30,627	13,004	8,795	38.0	28.7	59.7	40.3	14,288	9,474	41.6	30.9
May	124		33,884		11,549		34.1				12,897		38.1	
June	120		33,074		11,773		35.6				13,560		40.4	
July	122		33,566		14,078		41.9				15,501		46.2	
August														
September														
October														
November														
December														
<u>Year - 1977</u>														

1/ Western inaugurated Los Angeles-Miami service on August 1, 1976.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing and annexed Supplemental Brief of National Airlines, Inc. were mailed, postage prepaid, this 19th day of January, 1977, to the following:

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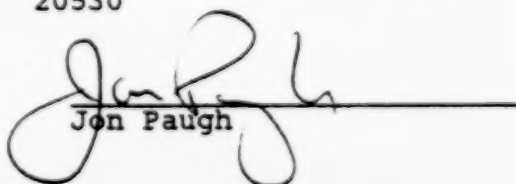
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